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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Section 25
of the Cable Television Consumer
Protection and Competition Act
of 1992

Direct Broadcast Satellite
Public Service Obligations

MM Docket No. 93-25

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REPLY COMMENTS

OF

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**IS DEFINITION OF THE TERM "NONCOMMERCIAL EDUCATIONAL AND
INFORMATIONAL PROGRAMMING" NECESSARY?**

I. INTRODUCTION.

This section deals with comments in regards to the definition of "noncommercial educational and informational programming" as codified in the newly amended Cable Act of 1992.¹ This comment advocates that there is a no need for a narrower definition of "noncommercial educational and informational programming." This definition adheres to the FCC's goals and furthers the purposes of the FCC. This definition will have and effect on many players in the DBS industry, the different programming needs and requirements as well as DBS as a whole. Some of the biggest players with an interest in this legislation are the FCC, Proponents of Children's programming and commercial businesses.

This comment seeks to address the individual concerns with the enacted definition and whether the definition is adequate or whether a narrower definition would better address the needs and issues of each group. This comment will first address the goals and purpose of the FCC as established through previous legislation, specifically the 1984 Cable Act, and whether this definition seeks to further those goals. Secondly, this comment will address the mission of Promoters of children's programming and how this definition satisfies those goals. Finally, this comment will address the needs of commercial television to be fairly represented by the legislation and if this definition complies with those needs.

¹ See 47 U.S.C. Sec.335(b) (1992).

II. FCC'S NEED TO MAINTAIN AN OPEN AND FLEXIBLE APPROACH TO DBS.

The 1984 Cable Act codified the belief that a national policy concerning cable communications was necessary.² The Cable Act delegates most of the authority for regulating cable to local governments, with the belief that local communities would know their own needs for cable services better than the federal government.³ The Act authorizes the state and local authorities to govern the important choices such as who, what, and how cable service should be delivered.⁴ The liberal authorization entrusted to the state and local governments was paramount in the FCC's defining of the parameters of the Act.⁵ It is this liberal thinking which is embodied in the Cable Act of 1992.

² 47 U.S.C. Sec. 521(1) (Supp. III 1985)); see also H.R. Rep. No. 934.

³The Cable Act gives local governments the authority to grant franchises. *Ibid.*

⁴ See 47 U.S.C. Sec. 521 (1985).

⁵ See, e.g. *City of Los Angeles v. Preferred Communications, Inc.*, 106 S.Ct. 2034 (1986), in which the court help to define the balancing of interests. The court noted that while cable operators engage in "activities which plainly implicate First Amendment interests" (at 2037) at the same time, "where speech and conduct are joined in a single cause of action, the First Amendment values must be balanced against competing societal interests." (at 2038). See also, *Pacific West Cable Co. v. Sacramento*, 798 F.2d 353 (9th Cir. 1986), where the court recognized the authority of the city to regulate "the noncommunicative aspects of cable broadcasting through reasonable time, place and manner restrictions." (at 355). See also, *Quincy Cable TV, Inc. v. F.C.C.*, 768 F.2d 1434 (D.C. Cir. 1985), cert. denied, 106 S.Ct. 2889 (1986), in which the court struck down the FCC's mandatory signal carriage rules as formerly written.

A. Application to DBS: Open Sky Policy.

Enter Direct Broadcast Satellite (DBS) which now defies the boundaries of state and local regulation and begs for national and international regulation. The Commission's approach to DBS regulation is "to maintain an open and flexible approach that will allow the business judgments of the individual applicants to shape the character of the services offered."⁶ The Commission hoped that this "open sky policy would encourage the submission of a wide variety of proposals and consequently afford the public the full benefits of experimentation with this new service."⁷ The term "noncommercial educational and informational programming" is consistent with the FCC's "open sky" policy.

B. Definition Encourages Experimentation.

There were a couple of reasons for this "open sky" approach. First of all, it "would allow operators to experiment with service offerings to find the offerings that the public needs and wants."⁸ Operators already are inundated with regulations which seek to limit their actions. Narrow definitions seek to exclude rather than include. Definitions such as the definition of "noncommercial educational and informational programming" will allow experimentation which in turn will help define the parameters of each category. A good example for the need for a broad definition in defining a category is

⁶ Report and Order, 90 F.C.C.2d 676, 698 (1982).

⁷ Ibid.

⁸ Ibid at 707-708.

evidenced throughout the cable history. If the cable industry had set out strict definitions the FCC may not be regulating cable today.

C. Lessons Learned From the Cable Industry.

The history of the cable industry indicates that if a broader definition is applied with the proper balance of judicial interpretation to define the narrower parameters of the definition, the result is an escalation in experimentation. Originally the FCC denied jurisdiction over the cable television industry.⁹ However, due to a greater demand for regulation, the Commission acknowledged jurisdiction and adopted rules for cable systems.¹⁰ This authority was upheld in *United States v. Southwestern Cable Co.*¹¹ The court found that "the Commission was expected to serve as the single Government agency with unified jurisdiction and regulatory power over all forms of electrical communications, whether by telephone, telegraph, cable, or radio...[and] that [this] regulatory authority [over cable] is imperative if it is to perform with appropriate effectiveness certain of its responsibilities."¹² These rules went through a number of

⁹ CATV and TV Repeater Services, 26 F.C.C. 403 (1959).

¹⁰ CATV and Community Antenna Systems, 2 F.C.C.2d 725, 741-43, 6R.R.2d 1717, 1740-43 (1966).

¹¹ 392 U.S. 157 (1968).

¹² *Ibid* at 167-173.

changes and each time becoming more specific in their definitions and meanings.¹³

Court decisions provided the proper forum in determining the cable industry parameters and definitions.¹⁴ If we are to learn from the cable industry on how to approach a definitional issue, it would be fair to say that broader is better.

A narrower definition is contrary to the philosophy of the Commission's approach to regulation. An example of a narrow definition is the House Version of the Cable Act. The House version of the Cable Act was the original basis for this section.¹⁵ The House Report originally attempted to define the specific service uses to be included and subject to this regulation. The version stated:

(1) telecommunications entities, including programming furnished to such entities by independent production services; (2) public or private educational institutions, or entities for educational, instructional, or cultural purposes; and (3) any entity to serve the disparate needs of specific communities of interest including linguistically distinct groups, minority and ethnic groups, and other groups.¹⁶

¹³ See generally, Cable Television Report and Order, 36 F.C.C.2d 143, 24 R.R.2d 1501 (1972); Clarification of the Cable Television Rules, 46 F.C.C.2d 175, 29 R.R.2d 1621 (1974); Cable TV Capacity and Access Requirements, Report and Order, 59 F.C.C.2d 294, 37 R.R.2d 213 (1976); The Cable Communications Policy Act of 1984, 47 USC Sec 521-59 (1984).

¹⁴ See *United States v. O'Brien*, 391 U.S. 367 (1968), where the court established a First Amendment standard for symbolic speech to evaluate the reasonableness of cable regulations, balancing the First Amendment values against competing social interests. See also *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367 (1969), where the court upheld the F.C.C.'s requirement that the fairness doctrine apply to broadcasters, arguing a "scarce resource".

¹⁵ MM Docket No. 93-25, Federal Communications Commission, FCC 93-91 (1993).

¹⁶ See House Report at 124.

This definition seeks to limit those entities which are now or within our limited imagination definable. It is easy to imagine, given the history of the cable industry as a guide, that programs will be created which will not categorically fit within one of these definitions. This dilemma leads to a couple of options for the programmer. One, the programmer can go ahead with the program and seek to test the definitional boundaries. Two, he might choose not to pursue at all since his programming does not fit into these parameters. This limits the parameters of experimentation and in the end the benefit to the consumer. What is the incentive for programmers to go outside these definitions with new programming when the definitions are set. The alternative, a broader definition, gives incentive to try anything since they are not initially excluded. When the boundaries of an emerging and rapidly changing technology such as DBS change with each passing day it is a better approach to help define an entity by what it is not, rather than by what it is. This approach was also demonstrated by the history of the cable industry. Therefore the definition of "noncommercial educational and informational programming" is consistent with the FCC's concern for the benefit of the consumers.

D. Definition Allows for Data Compilation Without Limitations.

A second reason for this "open sky" policy is that this policy will allow the Commission "to gather information about the operation of the industry...[and] to make

is allows the FCC to do exactly that. Since DBS is in its infancy there are many years of growth ahead. Since we are awaiting the launching of the first DBS station this rule is merely a guideline. As the services increase during these experimental years there will be a better understanding of the industrie's needs.

A more restrictive approach might unduly constrain the development of DBS services and increase the costs and risks to DBS operators in developing this new technology. These constraints might reduce the ability of DBS operators to attract financing and thus decrease the probability that the private sector will undertake DBS ventures.¹⁸ Not only would this be self destructive but would also be directly against the policy of the best interests of the consumer. Thus, the consumer would be the ultimate loser if a more restrictive definition were to be imposed at this point in time. This is not to say that at a later point in time when a specific need has been recognized and that the Commission or the courts feel that this need should be regulated the Commission should do so. The Commission will be in a better position to make a more restrictive definition without unduly burdening the development of the DBS industry and the ultimate winners will be the consumers.

III. PROPONENTS OF CHILDREN'S PROGRAMMING INTERESTS.

One group watching this legislation with a careful eye are the proponents of children's programming. DBS will need to address the issues of children's programming since there is no doubt that many of the programs will be directed

¹⁸ Id.

specifically at children. The Children's Television Act of 1990 demonstrates the concerns over the quality of children's programming.¹⁹ Specifically, the concern is with the power of television commercial advertising to unfairly influence children. This legislation seeks to protect children from the confusion and deception the intermixture of related programs and commercial material may inflict upon them.²⁰ Given this concern the definition of "noncommercial educational and informational programming" seems to not follow the example set in the Cable Act of 1990.

A. Cable Act Defines Educational and Informational Programming.

Directly analogous to DBS concerns the Act defines educational and informational programming for purposes of cable television as "any programming which furthers the positive development of children sixteen years of age and under in any respect, including the child's intellectual or cognitive or social and emotional needs."²¹ This is a very broad definition, leaving room for interpretation as to what qualifies as a program furthering positive development for intellectual, cognitive, social or emotional needs. This definition is in line with DBS's "open sky" policy.

¹⁹ MM Docket No. 90-570.

²⁰ MM Docket No. 83-670.

²¹ Notice, 5 FCC Rcd at 7201.

B. Application of an Open Sky Definition.

The legislative history provides a wealth of examples of the determination of children's programming as educational and informational.²² Examples include, "Fat Albert and the Cosby Kids" as educational because they deal with issues important to kids, with interruptions by a host reinforcing the purpose of the show.²³ "Winnie the Pooh and Friends" was educational because it was based on books designed to encourage reading.²⁴ "The Smurfs" was considered to have prosocial behavior concepts and "Great Intergalactic Scientific Game Show" based its show on basic scientific concepts.²⁵ The Act limited its guidance to the given legislative history and court determinations to decide the definitional sufficiency of educational and informational. However, the proponents of children's programming originally wanted more restriction. This requirement for more restriction is evidenced through the opinion of the Cable Act itself.

C. Advocates Want More Restriction.

One example is in the definition of Program Length Children's Commercials. The Act defines them as "a program associated with a product in which commercials for that product are aired."²⁶ Originally, advocates for children's programming sought to

²² Senate Report at 23; House Report at 17.

²³ FCC 91-113 at 21.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Notice, 5 FCC Rcd at 7201.

establish a rebuttable presumption that if there is less than a two-year time span between the introduction of a television program and a related product this would be a prima facie showing of a program length commercial.²⁷ This type of legislation seeks to protect the children but puts an undue restraint on the free market system.

Therefore, it becomes a balancing issue when looking at determining legislative definitions. The broad definitions employed by the Children's Television Act and The Cable Act both allow the court to properly weigh the elements in each case.

Our analysis can be distinguished in the fact that these advocates seek to protect children and in doing so, since children are so easily influenced, the regulations sought are more stringent. The Cable Act on the other hand is dealing at large with the DBS community. Therefore, given the motives and history of the advocates of children's programming, the definition implemented will meet with a great deal of criticism. However, it is important to keep in mind that this seeks to address the DBS community as a whole and is subject to a future limitation.

IV. COMMERCIAL BUSINESS INTERESTS

An example of the commercial industries' frustration in regulations which are narrowly defined is evidenced in the above described *prima facie* standard as advocated by the proponents of children's television programming. In response to the proposal, numerous commentators voiced their opinion at the suggestion.²⁹

According to one proposal, the proposed restriction would inhibit the simultaneous introduction of any new program series and associated products, such as books, magazines, games and computer software whose purpose is to extend to the educational benefits of the programs.³⁰ The FCC was able to reason that such a definition would "stifle creativity by restricting the sources that writers could draw upon for characters, would limit revenues from merchandising which are an important source of production funding and would ignore the educational role toys or other related products can play in child development."³¹ Therefore, the commercial interests in the definition seem to be fully addressed in a broad definition which allows itself to judicial and legislative interpretation.

V. CONCLUSION.

The addition of Section 25(b)(1) to the 1992 Cable Television Consumer Protection and Competition Act is only the beginning in the attempt to regulate DBS. Even such tasks like determining which DBS entities should be covered by the 1992 Cable Act is

²⁹ HSN Comments at 26; Cohn and Marks at 26-27.

³⁰ Children's Televisions Workshop Reply at 11.

³¹ Disney Comments at 18-24; MPAA Reply at 4-6.

complicated by both the DBS regime and the complexities of the satellite programming distribution services.³² Why should the determination of the definition of "noncommercial educational and informational programming" be any different. The definition is directly in line with the FCC's philosophy and goals and act as an incentive to commercial interests to experiment and create. The interests of children's programming, admittedly, is hindered by such a broad definition and a more specific definition would serve to protect their interests. This downside is offset by the fact that future regulation will be sensitive to their needs as the parameters are subsequently narrowed. As the industry changes so will the definition. Therefore the "open sky" definition is appropriate at this stage in the development of DBS.

³² MM Docket No. 93-25, Federal Communications Commission, FCC 93-91 (1993).